IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

APPEAL NO. 1220 OF 1996
IN
ARBITRATION PETITION NO.12 OF 1996
IN
AWARD NO.220 OF 1995

Oil & Natural Gas Corporation Ltd.,
a corporation established under
the Oil and Natural Gas Commission
Act, 1959 and having its Principal
Office at Tal Bhavan, Dehradun,
U.P. and its Off-Shore Project office
at 15th Floor, Maker Tower, "E"
Cuffe Parade, Colaba, Bombay-400 005...Appellant
(Orig.Respondent)

v/s.

Off-Shore Enterprises Inc. a
Corporation incorporated under
the Laws of Liberia, having their
Registered office at 80, Broad
Street, City of Monrovia, Country
of Monteserrado, Republic of
Liberia. .. Respondent
(Orig.Petitioner)

Mr. D.R. Zaiwala, senior counsel with Mr. P.A.Savant i/by M/s. Vyas & Bhalwal for appellant.

Mr.S.H.Doctor, senior counsel with Ms. Anjali Chandurkar i/by M/s. B. Munim & Co. for respondent.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 27/28th July, 2004

ORAL JUDGMENT (Per R.M.Lodha, J.)

An award dated 18th September, 1995 in the sum of Rs.36,38,50,000/- was passed in favour of the appellant by the Arbitrators. The respondent filed

petition for setting aside the said award as being null and void. The respondent succeeded before the learned Single Judge and the award dated 18th September, 1995 was set aside vide judgment dated 2/3rd September, 1996. That is how the appellant is in appeal before us.

2. For the sake of convenience, we shall refer the respondent as 'contractor B' and the appellant as 'the purchaser' since they have been referred as such in the agreement dated 14th July, 1981 (for short 'the contract'). By the contract entered into between the parties, the contractor B agreed to supply equipment, engineering drawings, project management and construction supervision to one Paul Lindenau GMBH (referred to as 'contractor A' in the separate contract of the even date between the purchaser and Lindenau) in respect of the Drillship agreed to be purchased from the Paul Lindenau and to assist with the design, supply, building, launching and equipment the said drillship for the purchaser on the terms and conditions contained therein. The said Drillship later on known as 'Sagar Prabhat' was mobilised and arrived off Bombay on 4th June, 1982 and was taken over by the purchaser on 5th June, 1982. The disputes arose between contractor B and the purchaser under the said contract. For resolution of the said dispute as per the arbitration clause under the contract,

the contractor B appointed Mr. K.H.Bhabha, the senior advocate, High Court, Bombay as one of the arbitrators vide their letter dated 7th July, 1982. Initially, the purchaser appointed Mr. S.B.Kabra as the other arbitrator but there was dispute about his appointment and ultimately, by an order of this court passed on 6th April, 1983, in place of Mr. S.B.Kabra, Vice Admiral Mr. N.P.Datta was appointed as co-arbitrator alongwith Mr.K.H.Bhabha. The said arbitrators entered upon the reference in the arbitration of 24th August, 1983. The contractor B filed its claim before the said arbitrators on 7th October, 1983 and the purchaser is said to have filed its written statement and counter-claim before the said arbitrators on 10th February, 1984. It appears that before the said arbitrators in the proceedings held in the month of March, 1986, the purchaser referred to stability of the said drillship. During the course of their arguments and on 5th July, 1986 at the meeting before the said arbitrators, the purchaser sought to tender compilation containing stability calculations of the drillship. The contractor B objected to the said course. In the meeting held on 7th July, 1986 before the said arbitrators it appears to have transpired that fresh reference may be made after formalities are completed for referring the dispute pertaining to the stability of the said drillship. Accordingly, the said

arbitrators did not accept the compilation tendered by the purchaser on 5th July, 1986. By the letter dated 1st August, 1986, the contractor B through its advocates in the context of the purchaser having challenged the stability of the drillship wrote to the purchaser that the dispute had arisen between the parties with regard to the deficiency in the stability of the drillship and that it was desirous of referring the dispute in accordance with the provisions of Article 13.2 of the said contract. By the said letter, contractor B appointed Mr. K.H.Bhabha, senior advocate as one of the arbitrators and the purchaser was requested to appoint another arbitrator within 15 days from the date of the said letter failing which it was stated that Mr. K.H.Bhabha would be appointed as sole arbitrator in the matter. The purchaser appointed Vice Admiral N.P.Datta as the other arbitrator on 14th August, 1986. The arbitrators entered upon the reference in respect of the disputed claim of the purchaser concerning the deficiency in the stability of the said drillship on 4th September, 1986. The arbitrators held their meeting on 11th September, 1986 and the purchaser was directed to file their statement of claim on/or before 6th November, 1986 and the contractor B was directed to file their reply to the purchaser's statement of claim on/or before 24th December, 1986. The arbitrators extended the time for filing

the statement of claim by 2nd December, 1987 and the contractor B was directed to file their reply within six months therefrom. The statement of claim was filed by the purchaser on 2nd December, 1987 alleging the defects and deficiencies in the stability of the said drillship and in the premises thereof interalia made a claim for the cost required to carry out modifications to the said drillship and rectification of the defects. The purchaser claimed a sum of Rs.3.5 crores to bring about necessary changes and/or alterations and additions to enable operation of the drillship and US$ 1,80,000/- being the damages for non-use. The contractor B in response to the statement of claim filed on 2nd December, 1987 raised diverse objections interalia that the statement of claim filed by the purchaser related to the technical matters as provided in Article 13.1 of the contract and the same was one of the excepted matters under Article 13.2 and thus, the arbitrators lacked jurisdiction to decide the said issue and consequently the claim of the purchaser; that the claim was barred by law of limitation prescribed under Article 55 of the Limitation Act and the claim was also beyond the time prescribed under the contract relying upon Article 9.2.1 of the contract. It appears that on 5th January, 1989, the contractor B made an application, of course without prejudice to their contentions set up in

the reply interalia stating that the purchaser's claim related to the technical matters and the same could not be the subject matter of the decision by the arbitration and such matter is required to be referred to the American Bureau of Shipping (ABS) for technical opinion and the opinion given by ABS is binding on the parties and dispute has to be settled accordingly and in the meeting held on 17/18th January, 1989 the said application was handed in to the arbitrators and taken on record. The purchaser was agreeable to refer to the technical question of stability of the said drillship for opinion of ABS. Both the parties agreed to accept the opinion of the ABS and settle the dispute in accordance therewith. The stability of the drillship, accordingly, was referred to ABS and the ABS submitted the report on 18th May, 1990. The correspondence was exchanged between the parties thereafter and by letter dated 25th August, 1994, the arbitrators fixed the meeting on 31st August, 1994. The contractor B did not attend the said meeting. The matter was thereafter adjourned to 2nd September, 1994. By letter dated 2nd September, 1994, the constituted attorney for the contractor B wrote to the arbitrators that the matter being of technical nature, they have no jurisdiction to arbitrate the same. The arbitrators held the meetings on various dates of which due intimation was given to the contractor B

by the advocates for the purchaser but the contractor B did not choose to appear before the arbitrators. The copy of the affidavit of Pramod Seth filed by the purchaser before the arbitrators on 6th April, 1995 was also sent to the contractor B. However, the contractor B did not respond to the said affidavit. The next sitting of the arbitration was fixed on 24th and 25th April, 1995 but the contractor B did not appear. Then the arbitration meeting was held on 5th and 6th September, 1995. The arguments of the senior counsel for the purchaser were commenced and heard by the arbitrators. The contractor B was informed by the advocates of the purchaser that further hearing in the matter would commence on 15th September, 1995 before the arbitrators. On that day also, the contractor B did not appear. The comparative statement summarising the claim was filed by the purchaser on 15.9.1995 and copy thereof was sent to the contractor B on 16.9.1995. On 18.9.1995, the award in the sum of Rs. 36,38,50,000/- came to be passed in favour of the purchaser.

3. The award dated 18.9.1995 made and published by the arbitrators and filed before this court on 19.10.1995 was challenged by the contractor B and prayer was made for setting aside the said award. The award was challenged interalia on the grounds;

(i) that the dispute pertaining to the technical matters covered under Article 13.1 of the contract has to be resolved between the parties by referring the same to the ABS for its opinion and Article 13.2 excludes the determination of such dispute by the arbitrators and therefore, the arbitrators did not have jurisdiction to decide the dispute as it was not arbitrable; (ii) that the claim of the purchaser was barred by law of limitation under Article 55 of the Limitation Act and also beyond the warranty period provided under Article 9.2.1 and 9.2.2 and (iii) that the award passed by the arbitrators is beyond the statement of claim filed by the purchaser and is grossly disproportionate to the amount claimed therein. The purchaser, however, justified the award and set up that no case for setting aside the award is made under section 30 of Arbitration Act, 1940.

4. The learned Single Judge inter alia held: (i) that the arbitrators had no jurisdiction to determine the issue of technical nature as the same was not arbitrable and beyond the scope of the agreement for arbitration; (ii) that the arbitrators were not authorised to interpret the ABS report and they did not have jurisdiction to determine the issue pertaining to technical matters (iii) that the arbitrators acted beyond their jurisdiction or the scope of reference of claim and

thereby legally misconducted themselves by making the award and (iv) that the arbitrators awarded the amount which was highly inflated and disproportionately high and there was no basis for award being passed for such amount. The learned Single Judge accordingly, by her judgment dated September 2/3, 1996 set aside the award.

5. We heard Mr.D.R. Zaiwalla, the learned senior counsel for the purchaser and Mr. S.H.Doctor, the learned senior counsel for the contractor B extensively and at length.

6. Article 13 of the contract provides for arbitration. It reads thus-

> "13. **ARBITRATION**
>
> This contract is based upon mutual confidence and friendly co-operation. In case any dispute or difference shall arise, it shall be settled as far as possible by means of negotiations between the parties hereto.
>
> 13.1 THE DISPUTES AND DIFFERENCE ON TECHNICAL MATTERS.
>
> Any dispute or difference of opinion between the parties hereto relating to this Contract regarding the Construction of the Drillship or on the material used for the construction of the Drillship or on the equipment incorporated in the Drillship, or in relation to the prescribed Specification or relating to any other technical matters, may at the discretion of the parties be referred to ABS for its technical opinion and the opinion given by the ABS shall be accepted by the parties and the disputes shall be settled accordingly.

13.2 DISPUTES AND DIFFERENCES IN ALL MATTERS.

In case of any difference or dispute arises under this contract or in connection with, under or any way touching or concerning this Contract whatsoever, or the construction thereof or relating to the rights, duties or obligations of any party hereunder, or as to any other matter in any way arising out of or relating to, or concerned with the subject matter hereof (except as to any of the matters the determination of which is specifically provided for by this contract) including whether the delay on account of arbitration shall be considered as a permissible delay or not, the same shall be referred to Arbitration under the Indian Arbitration Act. One Arbitrator to be nominated by each party and the third being a chairman/Umpire to be appointed by the two Arbitrators before proceeding with the arbitration, failing which by the Chief Justice of India. The decision of such arbitrators or in the event of difference of opinion amongst them, the decision of the majority, as the case may be, shall be final and binding on the parties. The place of arbitration shall be in India and arbitration proceedings shall be conducted in English language."

7. Article 13 provides the whole process and mechanism for resolution of disputes and differences between the parties under the contract. In the event of any dispute or difference of opinion between the parties relating to technical matters, Article 13.1 provides for reference to ABS for its technical opinion. The opinion given by ABS is binding on the parties and the dispute is agreed to be settled accordingly. Article 13.2 provides for resolution of disputes and differences between the parties in all matters. It is agreed

by the parties that in case of any difference or dispute arising between them under the contract, the same shall be referred to the arbitration under the Indian Arbitration Act; one arbitrator to be nominated by each party and the third being chairman/umpire to be appointed by two arbitrators before proceeding with the arbitration. This clause excepts determination of the matters specifically provided in 13.1. The question that falls for consideration immediately before us is whether the claim made by the purchaser is excepted under Article 13.2 of the contract and, thus, not arbitrable by the arbitrators.

8. In the statement of claim, the purchaser set out the detailed data, facts and figures that the drillship delivered by the contractor B to the purchaser was of a poor and substandard quality and not upto the mark to carry out normal drilling operations as stipulated by the contract and as a consequence thereof prayed for; (i) return of all the amounts received towards consideration of the said drillship; (ii) the sum of Rs.3,50,00,000/- for rectification of the defects and deficiencies in the drillship and (iii) the amount of us$ 1,80,000/- being the amount of damages for non-use of the drillship at the rate of US$ 20,000 per day for 90 days required to set the drillship right. Pertinent it is to notice here that in the meeting

held by the arbitrators on 17/18th January, 1989, the parties agreed that the technical question of stability of drillship be referred for the opinion of the ABS; contractor B agreed to accept the opinion of the ABS and settle the dispute in accordance therewith and the purchaser expressed willingness to accept the opinion of ABS as evidence. Accordingly the stability aspect was referred to ABS for technical opinion.

9. The dispute between the parties on the aspect of technical matter for which the matter was referred to ABS has not been arbitrated upon by the arbitrators; it was referred to the ABS for its technical opinion. The reference of the matter on technical matter to ABS was not by way of quasi-judicial adjudication nor it could be in the scheme of Article 13.1 of the contract. What ABS was required to do was to render its technical opinion on the dispute and difference on the technical matter between the parties having been referred to but the opinion by ABS under 13.1 is not the adjudication. One of the essential ingredients of the submission of the arbitration is that the parties should agree that the dispute intended to be referred should be determined in a quasi-judicial manner. Reference of the dispute and difference on technical matter to ABS was not intended to be determined in quasi-judicial manner.

When it is not so, Article 13.1 does not amount to submission to arbitration and ABS therefore, cannot be said to be deciding the dispute and difference on technical matter referred under Article 13.1 as an arbitrator. The distinction between the agreement for submission to an arbitration and an agreement to accept the technical opinion is apparent from the plain language of such Article 13.1 which provides that the technical opinion given by the ABS shall be accepted by the parties and the dispute shall be settled accordingly. The expression, "and the dispute shall be settled accordingly" signifies eloquently that the dispute and difference pursuant to the technical opinion of ABS has to be resolved either mutually or through the mechanism provided under Article 13.2. Article 13.2 indicates that all disputes and differences arising on the contract shall be decided by way of arbitration save and except the matters, the determination of which are specifically provided under Article 13.1. The technical opinion received from the ABS being binding on the parties cannot be reopened or redetermined by the arbitrators under Article 13.2 but the consequences flowing therefrom, if the parties are not able to settle the dispute upon receipt of the technical opinion on their own, has to be resolved through the mechanism of arbitration provided under Article 13.2. The purchaser in its claim raised the issue

of stability that the contractor B delivered the drillship of a very poor and substandard quality and not upto the mark and consequent thereupon inter alia claimed for an amount in the sum of Rs.3.5 crores to bring the drillship to desired state and condition. The issue of stability was referred to ABS by the Arbitrators and consequential money claim cannot be said to be beyond the jurisdiction of the Arbitrators. We are unable to accept the submission of the learned senior counsel appearing for the contractor-B that the statement of claim only deals with the technical dispute which is an excepted matter under Article 13.2. Mr.S.H. Doctor is not right when he contends that under Article 13.1, the parties had agreed on technical matter that opinion of ABS would be accepted by the parties and the dispute shall be settled accordingly, and therefore, the dispute is not arbitrable at all under Article 13.2. The fallacy of this contention is founded on erroneous premise as if there is no monetary claim by the purchaser based on the alleged deficiency in the stability of the subject drillship. While dealing with dispute on technical matter, ABS could not deal with the monetary claim and, therefore, such claim is not excepted.

10. Mr. S.H.Doctor, the learned senior counsel for the contractor B on the interpretation of the

excepted clause relied upon the Division Bench judgment of Madhya Pradesh High Court in the case of The Chief Administrator, Dandakaranya Project v. M/s. Prabartak Commercial Corporation Ltd., Calcutta, AIR 1975 Madhya Pradesh 152. The Madhya Pradesh High Court in paragraphs 31 to 39 held thus-

> "31. Clause 13-A of the agreement, reads-
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> "Clause 13-A: The Engineer-in-charge shall have power to make any alterations in, omissions from, additions to, or substitutions for, the original specifications, drawings, designs and instructions, that may appear to him to be necessary or advisable during the course of supply of the materials and the contractor shall be bound to supply the materials in accordance with any instructions which may be given to him in writing signed by the Engineer-in-charge, and such alterations, omissions, additions or substitutions shall not invalidate the contract and any altered, additional or substituted materials which the contractor may be directed to supply in the manner above specified as part of the work shall be supplied by the contractor on the same conditions in all respect on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work. The time for the completion of the supply shall be extended in the proportion that the altered, additional or substituted quantity of materials bears to the original quantity and the certificate of the Engineer-in-charge shall be conclusive as to such proportion. And if the altered, additional or substituted materials include any class of materials, for which no rate is specified in this contract, then such class of materials shall be supplied at the rates entered in the schedule of rates of the D.N.K.Project on which the estimated cost shown on page 2 of the tender is based; and if such class

of materials are not entered in the said schedule of rates, then the contractor shall within seven days of the date of his receipt of the order to supply the materials inform the Engineer-in-charge of the rate which it is his intention to charge for such class of materials, and if the Engineer-in-charge does not agree to this rate, he shall by notice in writing be at liberty to cancel his order to supply thereof in such manner as he may consider advisable, provided always that if the contractor shall commence supply or incur any expenditure in regard thereto before the rates shall have been determined as lastly hereinbefore mentioned, then in such case, he shall only be entitled to be paid in respect of the supply made or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-charge. In the event of a dispute the decision of the Superintending Engineer of the circle shall be final."

32. Clause 14, which is the arbitration clause, provides-

"Clause 14.- Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmenship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work, or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of the Chief Engineer/Additional Chief Engineer. Central Public Works Department and if the Chief Engineer/Additional Chief Engineer, is unable or unwilling to act, to the sole arbitration or some other person appointed by the Chief Engineer/Additional Chief Engineer willing to act as such arbitrator. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant that

he had to deal with the matters to which this agreement relates and that in the course of his duties as such Government servant, he had expressed views on all (or) any of the matters in dispute or difference. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to this contract."

33. It is necessary to consider the precise terms of the finality clause in Clause 13-A and the arbitration clause in Clause 14, and to decide whether the matter falling within the purview of the finality clause are outside the arbitration clauses. Now, the opening words in Clause 14 "Except where otherwise provided in the contract", clearly limit or control the operative part of Clause 14 which otherwise is in comprehensive terms.

34. The general rule that the grammatical and ordinary sense of the words in a contract is to be adhered to, unless such adherence would lead to some manifest absurdity or some repugnance or inconsistency, applies to building and construction contracts. The question, over what subject-matters the arbitrator is to exercise his powers, must be answered, by a reference to the particular words of the arbitration agreement (Russel on Arbitration; 17th Education, Page 43). That meaning is clear enough. Clause 13-A is a provision to the contrary. Therefore, all matters covered by the finality clause in Clause 13-A are outside the arbitration clause, Clause 14, and, therefore, cannot be referred to arbitration.

35. The law is succinctly stated in Halsbury's Laws of England, 4th Edition, Vol.4, para. 1215, Page 619, thus:-

"Effect of arbitration clauses. Where a contract contains an arbitration clause in sufficiently wide terms, the decisions of the certifier may be reviewed. In such a case, the contractor can recover without a certificate, the employer can claim for defective work despite the existence of a certificate expressing the architect's satisfaction, amounts certified can be reviewed and the contractor can recover for extra work

despite the earlier refusal of an architect or engineer to give a written order to do the work. A clause giving an arbitrator power to open up, review and revise the certificate, opinion or decision of the certifier and to determine all disputes and matters submitted to him as if no such certificate, decision or opinion had been given will certainly be wide enough. Current standard form contracts give such powers to the arbitrator.

In certain cases, despite an arbitration clause, on the proper construction of the contract some decisions of a certifier will not be subject to review. Thus where matters left by the contract to the decision or determination of the engineer were excepted from the arbitration clause, it was held that an engineer's certificate of completion and satisfaction was binding."

That takes us to the finality clause. 36.

36. Clause 13-A confers, in specific terms, power to the Engineer-in-charge to deviate from the terms of the contract, i.e., to make any alterations in, omissions from, additions to, or substitutions for, the original specifications, etc., that may appear to him to be necessary or advisable, during the course of supply of the materials, and the contractor shall be bound to supply the materials, in accordance with any instructions that the Engineer-in-charge gives to him in writing.

37. It envisages three categories of work, viz., (i) any altered, additional, or substituted materials, which he may be directed to supply, in the manner specified, shall be supplied by the contractor, on the same conditions in all respect on which he agreed to do the main work, and at the rates specified in the contract, (ii) if the altered, additional or substituted materials include any class of materials, for which no rate is specified in the contract, then such class of materials shall be paid for at the rate provided in the Dandakaranya Schedule of Rates, and (iii) work for which rates are neither specified in the contract nor do they appear within the Schedule or Rates.

> 38. In regard to the first two categories, there is not much scope of dispute. But it is in regard to the third category which presents difficulty and may create dispute as to the determination of the rates. The manner in which the dispute can be raised is also indicated. In the event of a dispute, the decision of the Superintending Engineer shall be final. The present work was, however, of the 2nd category, viz., there was supply of substituted material, i.e., hard stone chips, the rate of which was not specified in the contract, but appears in the Schedule of Rates.
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> 39. Reading the agreement as a whole, we are inclined to the view that Clause 13-A does not contemplate a submission of disputes covered therein to arbitration.
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> One of the essential ingredients of a submission to arbitration is that the parties should agree that the dispute, intended to be referred, should be determined in a quasi-judicial manner. Hudson's Building and Engineering Contracts, 8th Edition, page 222. If it is not to be so determined, the agreement does not amount to a submission to arbitration and the person, who decides the dispute, is not an arbitrator. Therein, lies the distinction between an agreement for submission to an arbitration and an agreement to accept the decision of a valuer or appraiser."

11. We are in agreement with the legal position highlighted by the Madhya Pradesh High Court that one of the essential ingredients of a submission of arbitration is that the parties should agree that the dispute intended to be referred should be determined in a quasi-judicial manner and if it is not to be so determined, the agreement does not amount to a submission to arbitration and the person who decides the dispute, is not an

arbitrator. In the present case, as we have already noticed, under Article 13.1 the reference of the dispute and difference on technical matter to ABS is for its technical opinion. ABS is not required to determine such dispute in quasi-judicial manner and therefore, the agreement as provided under Article 13.1 does not amount to submission to arbitration nor the ABS can be said to be deciding the dispute on technical manner as an arbitrator. Moreover, Article 13.1 itself provides that though the technical opinion so received from ABS is binding upon the parties, the dispute shall be settled by the parties accordingly. That means, after the ABS gives its technical opinion, if any dispute remains, either the parties settle the dispute on their own and if not possible then have to have that dispute resolved by mechanism provided under Article 13.2. The judgment of the Madhya Pradesh High Court has been affirmed by the Supreme Court, 1991(1) SCC 498, but for the reasons already indicated above, the said judgments do not help the case of the contractor B.

12. Mr.S.H. Doctor also invited our attention to the judgment of the Supreme Court in Executive Engineer, R.E.O. v. Suresh Chandra Panda, 1999(9) SCC 92. The clauses that were under consideration before the Supreme Court are reproduced in

paragraph 1 of the report and the said clauses read

thus-

"11. The Engineer-in-Chief shall have power to make any alterations or addition to the original specifications, drawings, designs and instructions that may appear to him to be necessary or advisable during the progress of the work, and the contractor shall be bound to carry out the work, in accordance with any instructions which may be given to him in writing signed by the Engineer-in-Charge, and such alteration shall not invalidate the contract and any additional work which the contractor may be directed to do in the manner above specified as part of the work, shall be carried out by the contractor on the same conditions in all respects on which he agreed to do the main work, and at the same rates as are specified in the tender for the main work.

Provided always that if the contractor shall commence work, incur any expenditure in regard thereof before the rates shall have been determined as lastly hereinbefore mentioned, then and in such case, he shall only be entitled to be paid in respect of the work carried out or expenditure incurred by him prior to the date of the determination of the rate as aforesaid according to such rate or rates as shall be fixed by the Engineer-in-Charge. In the event of a dispute, the decision of the Superintending Engineer of the circle will be final.

23. Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the work, or the execution, or failure to execute the same, whether arising during the progress of the

> work or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the Chief Engineer concerned. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a government servant. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract."

13. The clauses 13.1 and 13.2 under consideration before us are materially different as already discussed above and we need not repeat them. Moreover, the arbitrators have not gone into the excepted technical matter for which the opinion was sought from ABS. They could go into the consequential dispute flowing from technical matter; there is no difficulty about that.

14. The judgment of the Supreme Court in the case of Food Corporation of India v. Sreekanth Transport, (1999) 4 SCC 491 relied upon by Mr. D.R.Zaiwala may also be adverted to here. The Supreme Court in the case of Food Corporation of India was concerned with the following arbitration clause:-

> "All disputes and differences arising out of, in any way touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of a

person appointed by the Managing Director of FCLI. It will be no objection to any such appointment that the person appointed is or was an employee of the Corporation that he had to deal with the matters to which the contract relates and that in the course of his duties as such employee of the Corporation he had expressed views on all or any of the matters in dispute of difference. The Board (sic) of such arbitration shall be final and binding on the parties of this contract. It is a term of this contract that in the event of such arbitration to whom the matter is originally referred being transferred or vacating his office or being unable to act for reasons the Manager/Managing Director of FCI at the time of such transfer, vacation of office or inability to act shall appoint another person as arbitrator. Such person shall be entitled to proceed with reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by the Managing Director as aforesaid shall act as arbitrator and if for any reasons that it is not possible the matter is not to be referred to arbitration at all.

It is a term of a contract that the party invoking arbitration under this clause shall specify the disputes and/or difference to be referred to arbitration together with the amount claimed in respect of each such dispute/difference, at the time of making a request to the Managing Director for appointment of an arbitrator:

Provided further that any demand for arbitration in respect of any claims of the contractors under the contract shall be in writing and are made within one year of the date of termination of completion (or expiry of the period) of the contract from the date of termination of the contract, if it is terminated earlier and where such demand is not made within that period, the claims of the contractors shall be discharged and released of all liabilities under the contract in respect of these claims. It is further provided that the arbitrator may, from time to time, with the consent of the parties enlarge the time for making and publishing the award.

In all cases where the claim in

dispute is Rs.25,000 and above the arbitrator shall record the reasons for his award.

Subject as aforesaid the Arbitration Act, 1940 shall apply to the arbitration proceedings under this clause. The costs of and in connection with arbitration shall be in the discretion of the arbitrator who may make a suitable provision for the same in his award."

14. While dealing with the aforesaid clause, the Supreme Court in paragraph 12 of the report held thus-

"12. In the normal circumstances, the course of events as they are, this Court would not have dealt with the matters as are being presently dealt with but as has been pointed out by the High Court itself that the matters have been dealt with upon consideration of the cause of justice and to subserve the need of justice, we also do deem it fit and proper that by reason of the factual situation in the matter, the High Court was not left with any option but to direct such a course of action more so by reason of an express "abandonment of right" as noticed above. In the normal course of events if this particular clause 12 was not available in the contract between the parties the disputes in their entirety by reason of the scope and purview of the arbitration clause, could have been referred to arbitration and there would not have been any necessity for delving into the matter in the manner as we have hereinbefore, but it is by reason for the factum of incorporation of clause 12 and the subsequent abandonment thereof by reason of a decision to have the claim covered under clause 12 to be adjudicated by a forum different from that of the Senior Regional Manager, we also have no option left but to record our concurrence with the finding of the High Court that the fourth dispute being the subject-matter of a civil suit initiated by the Food Corporation of India be also referred to arbitration. Be it noted that this order

> is passed in the peculiar facts and circumstances of the facts in issue and the issue as regards the excepted matters has not been delved into in detail excepting however as above."

15. The Supreme Court expounded very clearly that excepted matters do not require any further adjudication. This legal position admits of no ambiguity. Suffice to repeat that in so far as present case is concerned, the arbitrators have not arbitrated upon the technical matter and there is no bar in Article 13.2 for the arbitrators to arbitrate the claim consequent upon the technical dispute.

16. For what we have stated above, we are unable to record our concurrence with the finding of the learned Single Judge that the arbitrators had no jurisdiction or authority to adjudicate the claim made by the purchaser as it was an excepted claim under Article 13.1.

17. Having found that the claim made by the purchaser was not an excepted matter, the next question before us is whether the judgment of the learned Single Judge has to be set aside or the impugned judgment setting aside the award is sustainable on other grounds.

18. The arbitrators in paragraphs 3 and 4 of the award noticed the purchaser’s claim. In paragraph

5, the arbitrators set out objections of the contractor B and in paragraph 6, the arbitrators referred to the minutes of the meeting held on 17/18th January, 1989 and the report of ABS. In paragraph 7, the arbitrators noted that the contractor B despite notices remained absent. The arbitrators in paragraph 8 of the award recorded thus-

> "8. We have perused the Contract, all the relevant records and facts the ABS Report dated 18.5.1990, the evidence recorded, the affidavits filed and the objections raised. We have also considered the contentions of both the parties. In these circumstances having given due consideration at Joint meetings held by both the Arbitrators, we hereby made and publish this Award as under.

19. Then the arbitrators passed the award thus-

> "10. Regarding Off-Shore objection regarding Limitation, we hold that in view of the facts and events on record, there is no Bar of Limitation.
>
> 11. Regarding ONGC claim, our Award directions are that Off-Shore do pay to ONGC the following amounts.

		Rs.in lakhs
(a)	For Cost of Anchors	225.00
(b)	For Cost of Anchor Chains	938.00
(c)	For procuring & fitting new motion Compensator	900.00
(d)	For additional sponsons	700.00
(e)	For Lay up charges	870.00
(f)	Cost of Arbitration	13.50
	Total Rs.	3,638.50

12. Regarding interest:

We Award and direct that interest at the rate of 12% on the total amount stated in para 11 above viz., Rs.36,38,50,000/- be paid by Off-Shore to ONGC from the date of the Award.

20. There being no challenge by Mr. S.H.Doctor to the submission of Mr. D.R.Zaiwala that the award passed by the arbitrators is non-reasoned and non-speaking award, we proceed with the matter accordingly.

21. Section 30 of the Arbitration Act, 1940 sets out the grounds or which an award can be set aside.

Section 30 reads thus-

"30. GROUNDS FOR SETTING ASIDE AWARD.- An award shall not be set aside except on one or more of the following grounds, namely:

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Sec. 35;

(c) that an award has been improperly procured or is otherwise invalid.

22. Mr.D.R. Zaiwala, the learned senior counsel for the purchaser cited the following judgments:-

(i) Union of India v. Salween Timber and Construction Co. (India) Ltd.,

AIR 1963 Calcutta 307;

(ii) Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore, AIR 1967 SC 1030;

(iii) Union of India v. Bungo Steel Furniture Private Ltd., AIR 1967 SC 1032;

(iv) V.Gurumurty Raju v. V. Narasimha Raju & ors., AIR 1954 Orissa 234;

(v) M/s. Allen Berry and Co. Pvt.Ltd. v. The Union of India, AIR 1971 SC 696;

(vi) U.P.Hotels etc. v. U.P.State Electricity Board, AIR 1989 SC 268;

(vii) State of A.P. v. Chandrasekhara Reddy and ors., (1998)7 SCC 141;

(viii) M/s. New Model Industries Ltd. v. Union of India, 2000(1) RAJ 29(Del).

23. Relying upon the aforesaid judgments, the learned senior counsel for the purchaser strenuously urged that once it is found that the claim made by the purchaser is not excepted; that the Arbitrators had jurisdiction to go into the claim made by the purchaser, the order passed by the learned Single Judge setting aside the award must go since in a non-speaking award, the court cannot speculate the reasons as to what impelled the arbitrators to their conclusion. The learned senior counsel would submit that in a non-speaking award, the court cannot set aside the award on the ground that there is an error apparent on the face of the record. The learned counsel submitted that the contractor B sat on the fence and did not choose to appear before the arbitrators and waited

for the arbitrators to pass the award and the award having been passed against them, they cannot turn around and assail the award on the ground of limitation or that the award is inflated or disproportionate to the claim made by the purchaser. According to him none of the grounds under section 30 is satisfied for setting aside the award once the jurisdiction of the arbitrators under Article 13.2 has been upheld.

24. On the other hand, Mr. S.H. Doctor, the learned senior counsel for the contractor B vehemently contended that even if the arbitrators are held to have jurisdiction in adjudicating the claim of the purchaser being not excepted or excluded under the arbitration clause, yet the award passed by the arbitrators being in excess of their jurisdiction suffers from jurisdictional error. The learned senior counsel would urge that the award passed by the arbitrators is unjustified, unjustifiable and exorbitant and not part of the statement of claim and no application for amendment or substitution of the statement of claim was made by the purchaser. He would contend that the affidavit of Pramod Seth was not an application for amendment or the substitution of claim nor any direction was sought for the substitution of claim. The contractor B was never informed that the affidavit of Pramod Seth was to be treated as the

claim. On the contrary, the affidavit of Pramod Seth was treated as evidence by the purchaser themselves which is clear from the record. The arbitrators misconducted in passing the award on the basis of the affidavit of Pramod Seth and the comparative statements tendered by the purchaser. The amounts awarded were not claimed by the purchaser in the statement of claim and were not part of arbitral reference. Mr. S.H.Doctor, thus, submitted that the award suffered from jurisdictional error and legal misconduct.

25. We shall first have a look at the authorities cited before us by the learned senior counsel for the purchaser.

26. In the case of Salween Timber and Construction Co. (India) Ltd., the learned Single Judge of Calcutta High Court held that the decision of the arbitrator, right or wrong, is not liable to be set aside unless the error of law is apparent on the face of the record.

27. The Supreme Court in the case of Firm Madanlal Roshanlal Mahajan held that the arbitrator's award on both fact and law is final and there is no appeal from his verdict. The court cannot review his award and correct any mistake in his adjudication unless objection to legality of award

is apparent on face of it. When arbitrator has given no reason for award, nor there is any legal proposition as basis of award, the contention that there are errors of law on face of award must be rejected.

28. In the case of Jivarajbhai Ujamshi Sheth, the Supreme Court held that the court while dealing with an application to set aside an award has not to consider whether the view of the arbitrator on the evidence is justified. The arbitrator's adjudication is generally considered binding between the parties, for he is a tribunal selected by the parties and the power of the court to set aside the award is restricted to the grounds set out in section 30 of the Arbitration Act, 1940. It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. By a certain process of reasoning, the court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

29. The Supreme Court in the case of M/s. Allen Berry and Co. held that as the parties choose

their own arbitrator, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Even when an arbitrator commits a mistake but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake.

30. In the case of U.P.Hotels, the Supreme Court held that even assuming that there is an error of construction of the agreement or even that there is an error of law in arriving at a conclusion, such an error is not an error which is amenable to correction even in a reasoned award under the law. In order to set aside an award, there must be a wrong proposition of law laid down in the award as the basis of the award.

31. The Division Bench of Orissa High Court in V.Gurumurty Raju, held that proceedings before arbitrators need not be conducted with such meticulous care as is required in ordinary civil courts so long as there is substantial compliance with the principles of natural justice. It was further held by the Orissa High Court that a party who, though repeatedly written to, does not appear before the arbitrator and allows the proceedings to go ex-parte, cannot later on say that he was not

given an opportunity of being heard.

33. At this stage, we may also refer to the decision of the Supreme Court in the case of Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and anr., (1999)9 SCC 283 cited by Mr. S.H. Doctor. The Supreme Court in that case considered its earlier decisions viz. Jivarajbhai Ujamshi Sheth (supra), Continental Construction Co.Ltd. v. State of M.P., (1988)3 SCC 82, Tarapore & Co. v. Cochin Shipyard, (1984)2 SCC 680, Sudarsan Trading Co. v. Govt. of Kerala, (198992 SCC 38, Associate Engg. Co. v. Govt. of A.P., (1991)4 SCC 93, Hindustan Construction Co.Ltd. v. State of J & K, (1992)4 SCC 217, Managing Director, J & K Handicrafts v. Good Luck Carpets, (1990)4 SCC 740, T.N.Electricity Board v. Bridge Tunnel Constructions, (1997)4 SCC 121, New India Civil Erectors (P) Ltd. v. Oil & Natural Gas Corpn., (1997)11 SCC 75, H.P. EB v. R.J.Shah & Co., (1999)4 SCC 214, P.V. Subba Naidu v. Govt. of A.P., (1998) 9 SCC 407 and Ch. Ramalinga Reddy v. Superintending Engineer, (1999)9 SCC 610 and culled out the legal position in paragraph 44 of the report thus-

> "44. From the resume of the aforesaid decisions, it can be stated that:
>
> (a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the

arbitrator to arrive at his conclusion.

(b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(d) If no specific question of law is referred, the decision of the arbitrator on that question is not final, however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. In a case where a specific question of law touching upon the jurisdiction of the arbitrator was referred for the decision of the arbitrator by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

(e) In a case of a non-speaking award, the jurisdiction of the court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether the arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.

(h) The award made by the arbitrator disregarding the terms of the reference or the arbitration agreement or the terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. Because of a specific bar stipulated by the parties in the agreement, that claim could not be raised. Even if it is raised and referred to arbitration because of a wider arbitration clause such claim amount cannot be awarded as the agreement is binding between the parties and the arbitrator has to adjudicate as per the agreement. This aspect is absolutely made clear in Continental Construction Co.Ltd. by relying upon the following passage from Alopi Parshad v. Union of India which is to the following effect: (SCC p.88, para 5)

> "There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an uncontemplated turn of events, the performance of the contract may become onerous."

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority

or misconduct on his part but it may tantamount to mala fide action.

(j) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks just and reasonable; the arbitrator is a tribunal selected by the parties to decide the disputes according to law."

33. The legal position that emerges is that in a case of non-speaking award, the jurisdiction of the court is limited but even in that limited jurisdiction, the award can be set aside by the court if the arbitrator acts beyond his jurisdiction or in excess of his jurisdiction or the award made by the arbitrator is in disregard to the terms of the reference or the arbitration agreement or the terms of the contract or the arbitrator awards an amount which is ruled out or prohibited by the terms of the agreement or the arbitrator acts arbitrarily, irrationally, capriciously or independently of the contract or the arbitrator ignores the law or misapplies it in order to do what he thinks just and reasonable. Such errors are jurisdictional errors and may amount to legal misconduct. As laid down by the Apex Court in Indian Aluminium Cables Ltd. v. Haryana State Electricity Board, 1996(6) Scale, 208, cited by Mr. S.H.Doctor, the jurisdiction of the arbitrators stands confined to those matters set out in the reference.

34. Is the award in excess of the jurisdiction or in other words, the award suffers from jurisdictional error or legal misconduct and rightly set aside by the learned Single Judge? In the limited scope of jurisdiction that the court has in the matters of non-speaking award, in order to find out whether the arbitrators exceeded their jurisdiction, it is open to the court to refer to the contract between the parties and the order of reference. The reference of the dispute to arbitration between the parties arising out of the contract dated 14th July, 1981 is reflected from the letter dated 1st August, 1986 sent by the contractor B to the purchaser. The said letter reads thus-

"1st August 1986

To:

Oil & Natural Gas Commission,
15th Floor, Maker Towers "E",
Cuffe Parade, Colaba,
BOMBAY - 400 005.

Kind Attn. Mr. S.K.Goyal, Chief Law Officer.

Dear Sirs,

We act for Offshore Enterprises Inc. of Board Street, Manrovia, Liberia.

Recently, that is in 1986, you have claimed that the Stability of the Drillship "Sagar Prabhat" supplied by our clients to you under the Contract dated 14th July 1981 between our clients and you, is defective and/or deficient. Our clients deny this claim made by you and deny that there is any defect or deficiency in the stability of

"Sagar Prabhat" as alleged by you or otherwise. Thus, a dispute has arisen between you and our clients with regard to the abovementioned matter.

Our clients are desirous of referring this dispute to arbitration in accordance with the provisions of Article 13.2 of the said Contract dated 14th July 1981.

Accordingly, our clients hereby give you notice that our clients have appointed Mr.K.H.Bhabha, Senior Advocate, having his Chambers at Bombay High Court Annexe High Court, Bombay as one of the arbitrators.

You in your turn are required to appoint another arbitrator within 15 clear days from the date of the service of this communication on you. Should you fail to do so within that time our clients shall have a right to appoint Mr. K.H.Bhabha as the Sole Arbitrator in the matter.

A copy of our letter of date to Mr. K.H.Bhabha appointing him as an arbitrator in the matter is enclosed herewith."

35. The dispute before the arbitrators had the cause title showing the contractor B as the claimants and the purchaser as the respondents. The purchaser filed its statement of claim before the arbitrators on 2nd December, 1987. In the statement of claim, the following prayer are made:-

"(a) That the claimants be directed to pay to the respondent a sum of 55 Million U.S. Dollars with further interest thereon at 12% per annum being the amount paid by the respondents to the claimants for the acquisition of the said drillship by the respondents from the claimants and that on the said amount being paid or in any manner secured to the respondents the claimants may be directed to take back the said drillship "SAGAR PRABHAT"

(b) That as an alternative to prayer (a)

hereinabove the claimants be directed to pay to the respondents (i) a sum of Rs.3.5 crore converted to U.S.Dollars at the convertible rate prevailing on or about the date of the award to enable the respondent to bring about necessary changes and/or alterations and additions in drillship in order that it may be put to enable the respondent to operate the same as held out in the agreement between the parties hereto dated 14th July, 1981;

(ii) a further sum of U.S. dollars 1,80,000/- being the amount of damages for non-use of the drillship at the rate of U.S. Dollars 20,000/- per day for 90 days required to set the drillship right.

(c) That in the alternative to either prayer (a) or (b) such relief as may be fair and proper having regard to the facts set out herein;

(d) The respondent be granted the costs of this Arbitration;

(e) And the respondents be granted such further and other relief as may be proper having regard to the nature and circumstances of the case;

36. From the minutes of the meeting held on 17/18th January, 1989 before the arbitrators that we have already noticed above that the parties were agreeable to refer the technical question of stability of drillship "Sagar Prabhat" for the opinion of ABS. That was done accordingly and ABS gave its report somewhere on 18.5.1990 to the purchaser. For the first time thereafter, the meeting was fixed by the arbitrators on 31st August, 1994. The said minutes of the meeting

dated 31st August, 1994 read thus-

"MINUTES OF THE MEETING HELD ON WEDNESDAY, THE 31ST AUGUST 1994.

PRESENT

Sr. Advocate Dara Zaiwalla,

Mr. S.A. Bhalwal and

Mr. P.V. Rao ... for O.N.G.C.

VENUE

At Sr. Advocate Mr. Dara Zaiwalla's Chamber at Bansilal Mansion, Homi Mody Street, Fort, Bombay.

M I N U T E S

The arbitration was fixed as per the letter dated 25th August 1994. Both parties were intimated.

Bachubhai Munim for Offshore Ent. Incorporated were also informed of the said meeting by the letter of 25th August 1994 of the meeting to be held on 31st Aug. 1994 at Sr. Advocate Mr. Dara Zaiwalla's Chamber.

After waiting for one hour we adjourned the meeting to 2nd Sept. 1994 at 2.00 p.m. at the same place.

M/s. Vyas & Bhalwal to inform M/s. Bachubhai Munim and Co. and Constituted Attorney Heena Rohit Barman."

37. On 2nd December, 1994, in the meeting held by the arbitrators, the purchaser was directed to file the ABS report as mentioned in the minutes dated 17/18th January, 1989 and the meeting was adjourned to 7th December, 1994.

38. On 7th December, 1994, on behalf of the

purchaser their senior advocate was present but nobody appeared on behalf of the contractor B. The relevant part of the minutes of the meeting held on 7th December, 1994 reads thus-

> "Mr. Zaiwalla opens case and addresses the Learned Arbitrators on the point of jurisdiction. The pleadings were gone through. Mr. Dara Zaiwalla also cites various laws.
>
> Learned Arbitrator Mr. K.H.Bhabha points out authorities which were discussed at length."

39. On the next day i.e., 8th December, 1994, the senior advocate appearing for the purchaser continued his arguments and he stated before the arbitrators that he would summarise his arguments in formal propositions as far as jurisdiction was concerned and make submissions on the point of limitation at a later stage. The meeting by the arbitrators was then adjourned to 9th December, 1994. The minutes of the meeting held on 9th December, 1994 read thus-

> MINUTES OF THE MEETING HELD ON FRIDAY, THE 9TH DECEMBER, 1994.
>
> PRESENT
>
> Sr. Advocate Dara Zaiwalla,
> Mr. S.A. Bhalwal
> Mr. P.V.Rao And
> Mr. Pramod Seth, D.G.M. (Log.) ..for O.N.G.C.
>
> V E N U E:
>
> At Sr. Advocate Mr. Dara Zaiwalla's chamber at: Bansilal Mansion, Homi Mody

Street, Fort, Bombay.

M I N U T E S

The Meeting commenced at 11 A.M. on 9th December, 1994 at the above office.

The pleadings of the parties wee gone into and the A B S Report was discussed. The matter remains P.H. and has been adjourned to 30.1.1995, 31.1.1995 and 1.2.1995. The Ld. Arbitrators directed ONGC Ltd. to keep its evidence ready which would be in the form of an affidavit and the copy of affidavit should be served on the other side atleast 4 days before the meeting and M/s. Vyas & Bhalwal were directed to give intimation to M/s. Bachubhai Munim & Co. and Ms. Heena Rohit Barman, C.A. of Offshore Enterprises Inc., informing them that the arbitration is proceeded with exparte, and they should remain present if they so desire.

The Ld. Arbitrators indicated that in view of the delay that has taken place and also on account of non appearance and non representation by Offshore Enterprises Inc. in this arbitration it would not be possible to complete the proceedings and requested ONGC Ltd. to make necessary application for extension of time for 6 months from December, 1994.

M/s. Vyas & Bhalwal has paid on account a sum of Rs.15,000 to each of the Arbitrators in pursuance of the directions given on 2.9.1994. Ld. Arbitrators directed that as Offshore Enterprises Inc. have not paid, ONGC Ltd. are to pay further sum of Rs.15,000 each on account to each of the Arbitrators."

40. From the minutes of the meeting held on 9th December, 1994 it would be significantly seen that the arbitrators directed the purchaser to keep their evidence ready in the form of affidavit. The copy of affidavit was directed to be served on the other side. In pursuance thereof, in the next

meeting on 6th April, 1995, fixed by the arbitrators, on behalf of the purchaser, the affidavit of Pramod Seth was tendered. On enquiry by the arbitrators, it was informed that the copy of the said affidavit has not been served on the other side. On behalf of the purchaser it was submitted by the senior advocate that if necessary, they would lead evidence of Mr. Pramod Seth orally. The minutes of the meeting held on 6th April, 1995 read thus-

"MINUTES OF THE MEETING HELD ON 6TH APRIL 1995.

PRESENT:

Sr. Advocate Dara Zaiwalla
Mr. S.A.Bhalwal
Mr. David Cyprian
Mr. M.S.Khan
Mr. S.K.Srivastava
Mr. Pramod Seth, DGM (Log.) .. for ONGC

V E N U E

At Sr. Advocate Mr. Dara Zaiwalla's chamber at: Bansilal Mansion, Homi Mody Street, Fort, Bombay.

M I N U T E S

Mr. Zaiwalla tenders the affidavit of Mr. Pramod Seth, D.G.M. (Log.), O.N.G.C.. The Learned Arbitrators enquired of Mr. Zaiwalla as to whether this affidavit was served on the other side as directed. Mr. Zaiwalla stated that he has not done so. If necessary, he will lead the evidence of Mr. Seth orally. The Learned Arbitrators thereafter directed that a copy of the Affidavit should be served on both M/s. Bachubhai Munim & Co., and Ms. Heena Rohit Barman, C.A. of M/s. Offshore Enterprises Inc. and inform them that the arbitration will be proceeded with

> tomorrow the 7th April 1995 at 12.30 p.m. at the same venue and that they should remain present and if they fail to do so the Learned Arbitrators will proceed with the matter ex-parte.
>
> M/s. Vyas & Bhalwal is directed to serve a copy of this minutes and the affidavit of Mr. Pramod Seth on both M/s. Bachubhai Munim & Co., and Ms. Heena Rohit Barman today itself. As informed to them, earlier, the arbitration is to be proceeded with on 6th, 7th and 8th April 1995, if necessary."

41. The next day on 7th April, 1995, the arbitrators treated the affidavit of Pramod Seth as his examination-in-chief and then the arbitrators examined him. The examination of Pramod Seth remained inconclusive and the matter was adjourned to 24th and 25th April, 1995.

42. On 24th April, 1995, the arbitrators were informed by the advocates of the purchaser that the minutes of the arbitration proceedings held on 6th and 7th April, 1995 have been sent to the Solicitors of the contractor. However, nobody appeared for the contractor and Pramod Seth was examined by the arbitrators on his affidavit and matter was adjourned to 25th July, 1995 for further examination. The examination of Pramod Seth by the arbitrators was concluded on 25th April, 1995.

43. The proceedings were then held on 5th September, 1995. On that day, the senior counsel for the purchaser commenced his arguments but

remained unconcluded. On the next day i.e., 6th September, 1995, the senior counsel for the purchaser addressed the arbitrators on jurisdiction and limitation and matter remained part-heard and adjourned to 15th September, 1995. On 15th September, 1995, the purchaser submitted the comparative statements which were taken on record. The arguments of the learned senior counsel for the purchaser were concluded and the meeting was fixed on 16.9.1995 and then on 18.9.1995. It appears that the comparative statement was served upon the contractor on 16.9.1995. On 18.9.1995 the award came to be passed in the sum of Rs.36,38,50,000/- alongwith interest at the rate of 12% on the said amount from the date of the award.

44. In the statement of claim, the claim has been made in the sum of Rs.3,50,00,000/- to enable the purchaser to bring about the necessary changes, alterations and additions in the subject drillship in order to put it in order for operation. The purchaser did not reserve any right to supplement or add their claim though the said amount was fixed tentatively. At no point of time, in the meetings held before the arbitrators, any request was made by the purchaser seeking amendment of the claim after the ABS report was tendered. Rather it is seen that on 9th December, 1994, the arbitrators directed the purchaser to keep their evidence ready

in the form of an affidavit. Obviously, the evidence that was directed to be produced was confined to the claim made by the purchaser in the statement of claim. On 6th April, 1995, in the affidavit of Pramod Seth which is in the form of the evidence, for the first time, an enhanced claim of Rs.2048.54 lakhs plus 18% interest was introduced without there being claim to that extent in the statement of claim. The consideration of the claim to the extent of Rs.20,48,54,000/- plus interest thereon at the rate of 18% per annum from 2.7.1982 when such claim was not founded in the statement of claim, we are afraid, the arbitrators travelled totally outside the permissible territory, and, exceeded their jurisdiction in making the award of Rs.36,38,50,000/-.

45. The learned senior counsel for the purchaser would submit that since the subject matter of arbitration remained the same, the arbitrators could have always considered enhanced or supplementary claim. He relied upon the judgments of the Supreme Court in the cases of State of A.P. v. Chandrasekhara Reddy and ors., (1998)7 SCC 141 and State of Orissa v. Asis Ranjan Mohanty, (1999)9 SCC 249. He also referred to the judgment of Delhi High Court in the case of M/s. New Model Industries Ltd. v. Union of India, 2000(1) Raj 29 (Del) and the judgment of Rajasthan High Court in

the case of Union of India v. Ajmer Construction Company, AIR 1997 Rajasthan 65.

46. In the case of Chandrasekhara Reddy, the Supreme Court held in para 9 of the report thus-

> "9. However, on the peculiar facts of this case, it is not necessary for us to consider this question any further. The reason is obvious. The learned trial Judge in his judgment while making the award the rule of the court has clearly held that though the objections under Section 30 of the Act and having so observed, the learned Judge proceeded to consider the objections to the award on merits in detail. Reasoning of the trial court Judge is found in para 6 of his judgment wherein the objections were metaculously considered and ultimately it was held that no doubt it appeared that the contractor had made excessive claim before the arbitrator but there was no material on record to point out that the petitioner (present appellant) had taken the same plea before the arbitrator. There was also no record to show that they had brought the matter into consideration of the learned arbitrator. The learned Judge also observed that the award was a non-speaking one and on merits it could not be interfered with by the Court by sitting in appeal over the findings of the arbitrator. The aforesaid reasoning adopted by the learned Judge is well sustained in the present case. When we turn to the objections filed by the appellant-State before the arbitrator, it becomes at once clear that the appellant-State thought it fit to join issue on merits of the claim before the arbitrator. No argument was placed before the arbitrator to the effect that the claim put forward before the arbitrator by the contractor was in excess of the original claim before the arbitrator and, therefore, could not be adjudicated upon. On the contrary, in the counter filed on behalf of the appellant-State before the arbitrator, it was stated that such claims that were required to be adjudicated upon

by the arbitrator were according to the appellant not justified. The arbitrator considered those claims with reference to their various sub-heads and out of the total claim of Rs.46,93,858 as found in the claim statement before the arbitrator and also the total claim at the time of rejoinder amounting to Rs.80,03,950, the arbitrator ultimately reduced the grantable claim to Rs.38,34,097. In our view, therefore, it cannot be said that the arbitrator had not applied his mind to the relevant heads of the claim as put forward by Respondent 1, nor did the State authorities ever contend before the arbitrator that the excess claim could not be adjudicated upon. Having chosen to join the issue on merits of the claim, the award of the arbitrator had to be treated as binding on the State authorities. It is also pertinent to note that the amounts claimed by the respondent-claimant in his letters dated 22.10.1983 and 24.10.1983 did not amount to total final claims. On the contrary, we find on the scrutiny of these letters that Respondent 1, the contractor had reserved liberty to put forward further claim on topics of disputed items. The matter would have stood differently, if these letters had confined the total claim of Respondent 1 to the amounts mentioned therein. Then a further question would have survived for consideration as to whether there was any further material available to enhance the said claim before the arbitrator but such was not the situation on the facts of the present case. Consequently, the decision rendered by the learned trial Judge on merits of these objections overruling them cannot be found fault with. In this connection, learned Senior Counsel for the respondent rightly invited our attention to a decision of learned Single Judge of the Orissa High Court in the case of State of Orissa v. Civien Construction Co. wherein Hon'ble R.N.Misra, J. (as he then was) in a similar situation held that as per the terms of the notice when the amount of claim was subject to further variations, if found necessary, additional claim could be submitted by the claimant before the arbitrator. Once this conclusion is reached, the result becomes obvious. The question whether the delay in filing the objections under Section 30 of the Act should have been condoned in

> the interest of justice or not would pale into insignificance and would be academic as the very same objections have been considered on merits and rejected by the trial court and the said rejection in our view is well sustained on the facts of the present case. The first point for consideration is, therefore, answered against the appellant and in favour of the respondent by holding that there is no need to condone the delay even in the absence of a written application and remand the proceedings for fresh decision as the said question has become of academic nature."

In the aforesaid case before the Supreme Court, the claimant reserved in his notice the right to make additional claims and in that background, the Supreme Court held that where right to make additional claim was reserved in the notice, the claimant cannot be prevented from making such claims later. In the statement of claim made by the purchaser, no such right to make additional claim has been reserved.

47. In the case of Ashish Ranjan Mohanty, the Supreme Court held in para 10 of the report thus-

> "10. Learned counsel for the appellant also contended that once having raised nine claims before the first arbitrator, the respondent was not entitled to raise any additional claims before the second arbitrator since the second arbitrator was appointed to continue the arbitration which was pending before the first arbitrator. However, the claims which were subsequently raised pertain entirely to the construction work in question and are not outside the ambit of the arbitration clause. In the statement of claims initially filed before the first

> arbitrator, the respondent had expressly reserved his right to file additional claims. We do not, therefore, see any reason to hold that the respondent was not entitled to file further claims before the second arbitrator."

The claimant in the aforesaid case had expressly reserved his right to file additional claims and therefore, the Supreme Court held that there was no reason to hold that the claimant was not entitled to file further claims.

48. The learned Single Judge of Delhi High Court in the case of New Model Industries Ltd. while dealing with the aspect of enlargement of the scope of reference in para 9 of the report observed thus-

> "9. What was the scope of the reference in the present case? Was it an adjudication whether the claimant was entitled to Rs.17.56 lakhs or was it not whether the Claimants, since both the parties had preferred their claim, entitled to any damage? Clearly, it was the latter of the two propositions. The arbitrator was called upon to fix the quantum of damages. Hence, merely permitting an amendment to enhance the monetary claim from approximately Rs. 17 lakhs to approximately Rs.21 lakhs could not be said to enlarge the scope of the Arbitration. If the amount claimed can be reduced, as was argued by the learned Counsel for the Objector, it can certainly be increased. As it happened in this case the increased monetary claim was on the basis of the price of chassis at the time of the filing of the Claim the Arbitrator rejected this and has granted Rs.12,17,405/- being actual cost incurred by the Claimants for the purchase of the chassis which the Objectors have detained. The scope of the Arbitration was not challenged at all and hence there is no invalidity in the award or any cause for

not pronouncing the judgment according to the award."

The aforesaid observations have no application in the case on hand as in that case an amendment to enhance the monetary claim was permitted. In the present case, the purchaser never applied for amendment of claim. The minutes clearly depict that the affidavit of Pramod Seth was tendered by the purchaser as a piece of evidence.

49. In the case of Ajmer Construction Company, the Single Judge of Rajasthan High Court in paragraphs 6 and 8 of the report observed thus-

"6. It is not disputed that water was to be supplied by the appellant. The grievance of the respondent was that despite such a stipulation, the appellant did not take any steps to lay down the pipe-line and fix the points from which the respondent could draw water. These are all requirements of clause (31) of the agreement. This dispute was, therefore, referred to the arbitrator and he gave his finding thereof. Hence, it cannot be assailed on the ground that if the arbitrator gave any finding on the dispute regarding water charges, he acted beyond his jurisdiction. The reference was in respect of water charges and this dispute therefore, clearly fell within his province.

8. In the instant case, as I have already stated, it was the province of the arbitrator to have given his award on the dispute regarding charges of water. Merely because there was disparity between the amount charged or claimed by the appellant and awarded by the arbitrator, it cannot be said that by doing so, the arbitrator has misconducted himself. In

> this connection, learned Counsel for the respondent submitted that in the area where the work was executed, there is acute water scarcity and the respondent had to transport water in tanks from long distances. If the water would have been supplied by the appellant through the regular water supply, naturally, the cost would have been nominal but when the water was brought from long distances there would be a phenomenal rise in transportation cost."

The learned Single Judge of Rajasthan High court obviously, has not laid down as a proposition of law that arbitrator can award a sum in excess of what is claimed.

50. On the other hand, in the case of Dandasi Sahu v. State of Orissa, AIR 1990 SC 1128 relied upon by the learned senior counsel for the contractor, the Supreme Court held that where the amount awarded is disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case where the arbitrator could be said to have not applied his mind amounting to legal misconduct. In para 5 of the report, the Supreme Court held thus-

> "5. This Court in State of Orissa v. Dandasi Sahu, (1988) 4 SCC 12: (AIR 1988 SC 179;) to which one of us (Sabyasachi Mukharji, J.) was a party while noting that the amount awarded is quite high or that a large amount has been awarded does not by itself vitiate the award as such, observed that one has to judge whether the amount of the award was so disproportionately high to make it per se bad on the facts and circumstances of a particular case. In this connection we

have to keep in mind that we are concerned with a situation where the arbitrator need not give any reason and that even if he commits a mistake either in law or in fact in determining the matter referred to him, where such mistake does not appear on the face of the award, the same could not be assailed. The arbitrator, in the case of a reference to him in pursuance of an arbitration agreement between the parties being a person chosen by parties is constituted as the sole and final judge of all the questions and the parties bind themselves as a rule to accept the award as final and conclusive. The award could be interfered with only in limited circumstances as provided under Sections 16 and 30 of the Arbitration Act. In this situation we have to test the award with circumspection. Even with all this limitations on the powers of Court and probably because of these limitations, we have to hold that if the amount awarded was disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case where the arbitrator could be said to have not applied his mind amounting to legal misconduct. It may be seen that in this case in the original claim made before the arbitrator the value of the work not paid was stated as Rs.3,87,796/-. The supplemental claim made before the arbitrator amounted to Rs.8,27,857/-. Thus the total value of the work not paid, according to the appellant, was Rs.12,15,673/-. As against this claim the arbitrator has awarded a lump sum of Rs.25,00,156/-. It is true that the appellant had asked for payment of interest and including interest his claim was Rs.31,44,437/-. In a recent judgment of this Court in State of Orissa v. Niranjan Swain, (1989) 4 SCC 269: (AIR 1990 SC 685), it has been held that where a reference to arbitration was made prior to the commencement of the Interest Act, 1978 (which Act came into force on August 19,1981) the arbitrator is not empowered to grant interest for the period upto the date of submission of the claim or the period during which the dispute was pending before the arbitrator. It was further held that where the award granted a lump sum amount it shall deem to have included the interest also if interest had been claimed before the arbitrator and the

> inclusion of such interest rendered that part of award invalid. If we exclude the interest portion then there could be no doubt that award of Rs.25,00,156/- suffers from the voice of giving disproportionately high amount."

51. In the present case the claim of the purchaser for rectification of the defects in the drillship was to the tune of Rs. 3,50,00,000/- though surreptitiously sought to be enhanced in the evidence to the extent of Rs.20,48,54,000/- plus interest of 18% per annum from 2.7.1982 That the amount referred to in the affidavit of Pramod Seth being not part and as per the statement of claim could not have been granted but the arbitrators went one step further and awarded the sum of Rs.36,38,50,000/- which is grossly and disproportionately high to the claim made in the statement of claim of Rs.3,50,00,000/- and even the amount of Rs.20,48,54,000/- referred in the evidence. This figure even does not match the comparative statements submitted by the purchaser before the arbitrators at the fag end of the proceedings on 15.09.1995. The comparative statements were neither part of pleading nor evidence. It is clear that the arbitrators awarded the amount which they were incompetent by virtue of the limits placed upon their authority in the light of the statement of claim dated 2nd of December 1987 filed by the purchaser. Arbitrariness unravels the non-speaking award as well. It is not

a question of mistake apparent on the face of the record but the matter of competence and jurisdiction of the arbitrators.

52. The learned Single Judge, thus, cannot be said to have erred in holding that the amount claimed in the statement of claim as originally filed and the amount awarded by the arbitrators, if compared, it was obviously clear that the amount awarded under the award was highly inflated and disproportionately high and there was no basis whatsoever for the said amount being awarded.

53. Before the learned Single Judge, the argument was advanced on behalf of the contractor B that the claim made by the purchaser was barred; firstly by law of limitation in asmuch as the purchaser took charge of the vessel on June 5,1982 and the statement of claim was filed on December 2, 1987 which was after a lapse of three years and secondly that the contract was contrary to the express provisions relating to the period of warranty contained in clauses 9.2.1 and 9.2.2 of the agreement.

54. The learned Single Judge considered this aspect in para 53 of the impugned order thus-

"53. On the question of limitation, no

> doubt there are number of judgement which have held that in case where there are two views possible and arbitrator acting upon a particular interpretation, the court is not bound to interfere or adopt its own interpretation. However, whether or not the Court should interfere with the interpretation made by the Arbitrators or adopt its own interpretation, would depend upon the interpretation of the terms of the contract and whether there is any dispute or difference between the parties which would require to be referred to the Arbitrator. Here, in the instant case, the question that arose is whether the Arbitrators have acted within the limits of their jurisdiction or have violated the same because admittedly the dispute was of a technical nature of the matter which was beyond the scope of the arbitration as provided under Article 13.1 of the contract. Therefore, as pointed out earlier, so far as the terms of the contract in the present case are concerned, admittedly the Arbitrators lacked jurisdiction to decide this issue and, therefore, the ruling cited by the respondents with regard to the limitation point is not material to the facts of the case on hand."

55. Having held that the dispute related to technical nature which was beyond the scope of the arbitration, the learned Single Judge held that the arbitrators lacked jurisdiction to decide the issue of limitation and therefore, she did not deal with this aspect further.

56. The learned senior counsel for the contractor B submitted that the arbitrator chosen by the parties to be their judge is bound by the law and has to decide the dispute according to law and the claim if barred by time could not have been awarded. He referred to section 37 of the

Arbitration Act and section 3 and article 55 of the Limitation Act. Mr. Doctor submitted that the claim barred by law could not be awarded and by awarding the claim barred by law, the arbitrators committed legal misconduct and on that ground also the impugned order does not call for interference.

57. Mr. Zaiwalla, the learned senior counsel for the purchaser, on the other hand, contended that the arbitrators have held that the claim was not barred by limitation and the court is not competent to set aside the non-speaking award even if that finding was right or wrong.

58. While arbitrators are within the limits of law, judges of law as well as fact, the courts, while they will not allow themselves to be made courts of appeal against the decisions of arbitrators on fact or on law, will at the same time, when awards are filed, allow the arbitrators to be law upto themselves to give them free hand to decide according to law or not according to law as they think fit, in other words to be outside the law. It is for the courts to see that the arbitrators act according to law and of its procedure and are not guilty in the award of patent injustice or unfairness or making an award that is unconscionable or manifests perversity or against the terms of agreement between the parties. In the

conduct of the proceedings or passing the award the arbitrators must conform to the terms contained in the agreement. Patent errors of law are legal misconduct on which a court can in the exercise of its powers set aside an award under section 30. In the present case, the drillship was taken charge by the purchaser on June 5, 1982 admittedly. The dispute relating to stability was referred on 1st August, 1986 and the statement of claim filed on 2nd December, 1987. The law of limitation applies to the claims before the arbitrators and even as chosen judges of the parties they are bound by the Limitation Act. Section 3 of the Limitation act provides that every proceeding made after the prescribed period shall be dismissed whether limitation has been set up as a defence or not. The claim made by the purchaser vide statement of claim dated 2.12.1987 is apparently barred by time under article 55 of the Limitation Act. If the affidavit of Pramod Seth is treated as the supplementary claim, though it is not, then the said claim made for the first time on 6th April, 1995 is time barred from any reckoning including the fact that ABS report was received on 18th May, 1990.

59. Clauses 9.2.1 and 9.2.2 of the agreement read thus-

"9.2.1 Warranty of Material and Workmanship

Subject to the provisions hereinafter set forth in this Article Contractor 'B' undertakes to remedy free of charge to the Purchaser any defect in the Drillship which is due to defective design, material or workmanship or poor or underrated performance/efficiency of operation. Provided that such defects are discovered within a period of twelve (12) months after the date of arrival of Bombay and a notice thereof is duly given to Contractor 'B' as hereinafter provided. Any defect caused by normal wear and tear or operation of equipment beyond the manufacturer's prescribed limit in manuals will not apply for this cause.

9.2.2 The Purchaser shall notify Contractor 'B' in writing within seven (7) working days after discovery of any defect for which claim is made under this warranty. The Purchaser's written notice shall describe the nature of defect and the extent of damage caused or likely to be caused thereby. Cable/telex advice within seven (7) working days that the claim is forthcoming will be sufficient to comply with the requirements as to time."

60. The aforesaid clauses of the contract would show that contractor B undertook to remedy free of charge to the purchaser any defect in the drillship due to defective design, material or workmanship or poor or under rated performance/efficiency of operation if the defects were discovered within the period of 12 months after the date of arrival of

the drillship at Bombay and a notice thereof was given to the contractor. The subject drillship arrived at Bombay on 4th June, 1982 and was taken over by the purchaser on 5th June, 1982. The warranty period as per clause 9.2.1 is 12 months from the date of arrival at Bombay i.e. 4th June, 1982. However the claim due to defective design, material or workmanship or poor or under-rated performance/efficiency of operation of the drillship was made in the statement of claim filed on 2nd December, 1987 which is much beyond the period of warranty provided in clause 9.2.1. In order to decide whether the arbitrators exceeded their jurisdiction, even with regard to non-speaking award, the court can always make reference to the terms of the contract. As held by the Supreme Court in the case of Rajasthan State Mines & Minerals Ltd., the award made by the arbitrator disregarding the terms of the contract would be a jurisdictional error. The arbitrators could not have awarded the amount to the purchaser due to defective design, material or workmanship or poor or under-rated performance/efficiency of operation in utter disregard of the clause 9.2.1 of the contract at whatever point of time it was made. The period of 12 months expired at any rate at the end of June, 1983 and, therefore, award suffered from serious jurisdictional error being contrary to the express provision of the contract contained in

clause 9.2.1. The impugned judgment setting aside the said award does not call for any interference.

61. Before we close we may notice the contention of Mr.S.H. Doctor, the learned senior counsel for the contractor B that during the pendency of appeal, the drillship has been sold by the purchaser and, therefore, there is no question of the purchaser repairing the subject drillship and the purchaser shall not be entitled to any claim and the award passed by the arbitrators having been set aside by the learned Single Judge does not call for any interference because of this subsequent event as well. We do not deem it necessary to go into the aspect of sale of drillship during the pendency of the appeal since even otherwise for the reasons already indicated by us, the award was liable to be set aside.

62. In the result, the appeal fails and is dismissed. No order as to costs.

Certified copy expedited.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)